IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 358 OF 2005

Ashok Rajaram Pakhare & Anr. ..Appellants

versus

Tukaram Dondiba Pakhare ..Respondent

Mr. M. M. Shetty for the Appellants.

Mr. Suresh Gole for the Respondent.

CORAM : D. G. DESHPANDE,J.

DATE : 26TH AUGUST,2005

ORAL ORDER:

1. Heard counsel for the Appellants and the Respondent.

2. This appeal is filed by the original defendants. Plaintiff - Respondent had filed a suit for permanent injunction restraining the defendants from entering the suit premises or claiming any right therein in Room No. 6 on ground floor of Gowar Taj Building, Dr. Babasaheb Ambedkar Road, Dadar, Mumbai 400 014, or from claiming or remaining in joint possession. This suit was filed in 2004 which was numbered as Suit No. 528 of 2004.

Plaintiff claim to be occupying the suit room exclusively, but in 1976 Plaintiff's sister late Akkubai and her husband Dado Kamble pleaded for some accommodation temporarily. Therefore, they were permitted to reside. Akkubai created some problems for the plaintiff, she was asked to vacate but she refused. Plaintiff filed an application under Section 41 of the Small Causes Court Act being E.A. No. 221/E of 1976. Even Akkubai and defendant gave evidence. That suit was decreed against Akkubai and her husband. The decree was executed. Defendant wrote on the execution warrant about the compliance to execution to the effect that the defendant had left the premises and Akkubai and Dagdu Kamble are not residing there, but he also wrote he has not removed any of his articles from the suit premises and he has a right to the suit premises. But the defendant was directed to remove the articles, therefore Bailiff made an inventory and handed over these articles to the plaintiff. Then defendants took out Petition for striking off the aforesaid entry in the warrant of possession. That application ultimately came to be dismissed. Defendants Appeal before the Small Causes Court also dismissed. Then the writ petition was filed, it was rejected. Then defendant filed a suit in the Small Causes Court. It was dismissed. Against that order, defendants filed Appeal and that Appeal also

came to be dismissed. That appellate court's order against the defendants was not challenged by them. Then requests were made by the plaintiff to the defendants to move from the premises, they did not do so even though the defendants have their own flat being Flat No.1 on the first floor in the very same building, and, therefore, in this background the suit came to be filed. It was decreed by the trial court and therefore this Appeal by the Defendants.

3. Even after hearing the counsel for the appellants, at length, I am not at all convinced by any of the submissions made by the counsel for the appellants. The entire history of prior litigation between the parties falsifies the case of the appellants. In the original Warrant for execution which was written by the appellant as under:

> "Ya Warrant pramane me kholitoon baher padlo. Akkubai va Shri Dagdu Kamble hey kholit rahat nahi, majhe saman meen kholi baher kadle nahi. Mi pude Kortat case carnar aahe. Karan majha tassa hakk aahe."

All these subsequent writing is rightly rejected by the trial court. If at all appellants had any right in the property, there was no reason for him to surrender to the decree in execution. Apart from

this, all the claims and contentions have been rejected by the Small Causes Court in his suit and Appeal, in both of which he failed, no writ petition was filed challenging the appellarte court's orders, therefore the case of the appellants stand negatived by judicial pronouncements. These important aspects and the previous history of litigation between the parties have been rightly considered by the trial court against the defendants, and no interference is required in this Appeal.

4. Another contention / objection of the counsel of the appellants was that the proper court fee for the claim was not paid by the plaintiff. Even that objection does not survive. Firstly, from the issues that were framed by the trial court, it does not appear that such a plea was raised by the defendants because no such issue of improper valuation is framed by the trial court. A copy of the plaint is annexed in this compilation. The claim is valued at Rs.19,167.75 paise being the 150 times the monthly rental. Nothing was shown by the counsel for the appellants that this valuation was wrong or illegal and therefore, there is no substance in this contention / objection regarding improper valuation.

5. It was also contended by the counsel for the

appellants that the suit was barred by limitation. This objection was raised by the defendants - appellants in the trial court as Issue No.2. The suit is actually for removal of the defendants - appellants from joint possession, and as rightly contended by the plaintiff, the period of limitation for the present suit arose for the first time on 3.5.2003 when the defendants Appeal No. 449 of 2000 was dismissed or rejected by the appellate court of the Small Causes Court. From 1982 to 2003 there was litigation between the parties, but the plaintiff got right to finally evict the defendants - appellants only in May 2003.

6. Counsel for the appellants tried to contend that if the defendants possession is there from 1982 then the suit should have been filed within 12 years and there was no order against the plaintiff restraining him from evicting the defendants. However, this is negatived by the order by the Small Causes Court in Injunction Notice No. 3301 of 1982 in R.A.D. Suit No. 3573 of 1982 where the present plaintiff was defendant No.2 and there is an order against the defendant No.2 i.e. the present plaintiff from dispossessing or disturbing the present appellants from the suit premises.

7. Second most important aspect of the matter

is the suit of the plaintiff is for ouster of the defendants from joint possession. So if this is a case and the limitation has to be considered from the pleadings of the plaintiff, then the period of limitation has started only when the appellants lost before the Small Causes Court, as stated above. Therefore, there is no substance in this objection regarding limitation. There is no merit in this appeal. In the result, I pass the following order :

ORDER

. Appeal is dismissed along with Civil Application, with costs all throughout.

. Prayer for stay is rejected, in the circumstances of the case.

26.8.2005 (D.G. DESHPANDE, J.)